BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1.

Petitioner was deprived of his constitutional right of trial by jury.

U. S. Constitution, 7th Amendment.
U. S. Constitution, 14th Amendment.

Jacob v. New York City, 315 U.S. 752, 86 Law Ed. 1166, 62 Sup. Ct .854.

Bailey, Adm. v. Central Vermont Ry., 319 U.S. 350, 87 Law Ed. 1030, 63 Sup. Ct. 1062.

QUOTING FROM AUTHORITIES

Jacob v. New York City, 315 U.S. 752, 86 Law Ed. 166, 62 Sup. Ct. 854:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of general jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Bailey, Adm. v. Central Vermont Ry., 319 U.S. 350, 63 Sup. Ct. 1062, Page 353:

> "The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. Jones v. East Tennessee V. & G. R. Co., 128 U.S. 443, 445; Wash-

ington & Georgetown R. Co. v. McDade, 135 U.S. 554, 572. To withdraw such a question from the jury is to usurp its functions.

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.'"

SUMMARY

This court has wisely and justly reiterated and put into practice through recent decisions the essence of democracy in our judicial system—the genuine right of trial by jury. Steadily this right was being encroached upon by our courts and especially our Federal Courts. Many District Courts have taken the Rules of Procedure as set forth by this court as the "go signal" for assumption of arbitrary power and undue and unwarranted control in the trial and disposition of cases. In this case the trial court first ordered, against the objection of petitioner, that the trial before the jury would be confined to the issue of liability and damages would not be considered by that jury (Tr. 89, 90) Whether the trial court would then assume to fix the damages itself or arrange for another jury to fix the damages is not certain. At any rate there was no good reason for such arbitrary action assumed under the Rules. Then the trial court took the notion to confine the evidence to the issue of probable cause. (Tr. 432, 433, 456) A perusal of the record will show many other arbitrary assump-

tions by the trial court of undue powers—not rights—by the court. Only if the Supreme Court by practical decisions safeguards the democratic rights of the people—will democracy be effective in the judiciary. The irony of this case will be observed in the opinion of the Circuit Court of Appeals in affirming the District Court partly for the reason that petitioner failed to produce affirmative evidence of malice. That was not correct because some evidence did creep in that showed malice. But our heads were cut off on that issue when the District Court arbitrarily directed petitioner to confine its evidence to want of probable cause.

Moreover, it is bad enough when under disputed evidence the trial court usurps the function of the jury by construing it to suit its point of view and stating that there is no dispute. Here the trial court went further. It took the evidence adduced, clear and unqualified, showing want of probable cause on the issue of insolvency, and on the issue of whether the so-called admission was sufficient cause for filing the first bankruptcy petition and the first cause in the second petition, and, as a magician alone can do, stated that there was probable cause and cut off our right of trial by jury. Interestingly enough, the respondents understood their position a bit better. They knew they had neither good or probable or any cause at all on their first petition. That is why they attempted to fortify themselves by the filing of a second petition with new causes. That is why they took a

voluntary dismissal of the first petition before trial. That is why they abandoned that same cause at the trial on the second petition.

We urge upon the court the important fact that there was no controverting testimony under the law to the plain showing made of want of probable cause. For our sake in obtaining our rights in this case and for the maintenance of democracy in the functioning of our judicial system we look to you to review our case.

2.

It was error for the District Court to deny petitioner the right to introduce evidence of malice and for the Circuit Court of Appeals to ignore that fact and base its decision, as stated in its opinion (Tr. 492) partly upon the proposition that there was no affirmative showing of malice. This point has already been covered by the preceding summary.

3.

Chapter 1, Sec. 1 (19) of the Bankruptcy Act plainly defines insolvency. This court has affirmed the plain meaning of insolvency as defined by the act. Circuit Courts of Appeal have so applied that definition. In this case the Circuit Court of Appeals applied a contrary meaning directly opposite to the plain language of the act and the construction given that language by this court and other Circuit Courts of Appeal.

Title 11 U.S.C.A., Sec. 1, Note 10.

Title 11 U.S.C.A., Sec. 1, 1943 Cum. Ann. Pocket Part.

Chapter 1, Sec. 1 (19) of the Bankruptcy Act.

Remington on Bankruptcy, Vol. 4A, 5th Ed., Sec. 1686.

Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 45 Law Ed. 1171, 21 Sup. Ct. 906.

Arkansas Oil & Mining Co. v. Murray Tool & Supply Co., 127 F. (2d) 564, 49 Am. B.R. 240 (C.C.A. 8th Cir.).

Lynn D. Laswell, Trustee v. Stein-Block Co., 93 Fed. (2d) 322, C.C.A. 5th Cir. 1937, 35 Am. B. R. 242.

QUOTING FROM AUTHORITIES

Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 45 Law Ed. 1171, 21 Sup. Ct. 906.

Quoting from 182 U.S. page 451:

> "At times a debtor's property, though amply sufficient in value to discharge all of his obligations, may not be convertible without sacrifice into that from by which payment may be made. The law regards that possibility. In this there is indulgence to the debtor, and through him to preferred creditors. The discussion need not be extended, the law has made its definition of insolvency, whatever the effect may be, and has determined by that definition consequences not only to the debtor but to his creditors and to purchasers of his property."

Arkansas Oil & Mining Co. v. Murray Tool & Supply Co., 127 Fed. (2d) 564, 49 Am. B. R. 240, C.C.A. 8th Cir. 1942.

Quoting from pages 565-6 of 127 Fed. (2d):

> "Under the provisions of the Bankruptcy Act here controlling [Bankruptcy Act, sec. 1 (15), Title 11 U.S.C.A.] one is insolvent 'whenever the aggregate of his property . . . shall not at a fair valuation, be sufficient in amount to pay his debts.'
>
> "Insolvency, under the act here involved, must be determined according to whether or not the aggregate of a person's property at a fair valuation is sufficient to pay his debts."

Lynn D. Laswell, Trustee v. Stein-Block Co., 93 Fed. (2d) 322, C.C.A. 5th Cir. 1937, 35 Am. B. R. 242.

Quoting from pages 322, 323 of 93 Fed. (2d):

> "In Carson, Pirie, Scott Co. v. Chicago Title & Trust Co., 182 U.S. 438 (451), 5 Am. B. R. 814, 45 L. Ed. 1171 (1178), it is pointed out that the Bankruptcy Act of 1898 has 'made its definition of insolvency, whatever the effect may be . . .'
>
> "Under the Act of 1898, a person is deemed insolvent when 'the aggregate of his property, . . . shall not, at a fair valuation, be sufficient in amount to pay his debts.' Bankruptcy Act, Sec. 1(15); 11 U.S.C.A., Sec. 1(15)."

Quoting from page 164 of Vol. 4A, Remington on Bankruptcy:

> "The definition ofinsolvency given in subdivision (15) of Sec. 1 of the Act of 1898 as originally enacted has not been amended. It is now found in subdivision (19) of Sec. 1, 11 U.S.C.A.,

> Sec. 1. The insolvency which must be established under Sec. 60 is the condition defined in subdivision (19) of Sec. 1. It involves the determination that the total of the provable debts owed by the bankrupt is greater than the aggregate of his property at a fair valuation, exclusive of any property he has concealed or transferred in fraud of creditors."

SUMMARY

That the District Court adopted the 1867 to 1898 and not the 1898 to present law defining insolvency is found in its statement on page 466 of the transcript. That the Circuit Court of Appeals failed to bring the District Court up to date on that proposition of law is apparent in its conclusion and its opinion. On page 488 of the transcript it says

> "On September 13 Phillips delivered to the Adjustment Bureau a statement in writing acknowledging the Stationery Company's liability to pay its debts and its willingness to be adjudged a bankrupt. Phillips signed the statement as secretary and manager."

In referring again to this statement (the only one there was) the Court referred to it (Tr. 492) as

> "the admission of insolvency."

We look to this court to correct the erroneous views and conclusions of the lower courts.

4.

The filing of an involuntary petition in bankruptcy

constitutes a caveat to all the world and in effect an attachment and injunction.

Mueller v. Nugent, 184 U.S. 1, 46 Law Ed. 405, 22 Sup. Ct. 269, 7 Am. B. R. 224.

SUMMARY

Here we beg to point out that it should make no difference that there may already be an attachment on assets of alleged bankrupt. That is almost always true. Businesses do recover from ordinary levies and attachments. They seldom survive an involuntary petition in bankruptcy. Can it be said in good reason that the fact that over $3000.00 in assets are attached for about $1000.00, gives just cause for stabbing the debtor with an involuntary petition? Moreover, in this case there were other assets, such as accounts receivable and neon sign and linoleum, etc. that were not attached.

5.

The appointment of a receiver and his qualification constitute a sequestration of the property involved. In the present case the receiver reported an inventory and petitioned to sell.

QUOTING FROM AUTHORITIES

45 Am. Jur. 127, Sec. 152.

53 C.J. 106.

W. W. Wilkinson vs. J. L. Walker, 2 Am. B. R. 743 (D. C. No. Dist. of Texas Sept. 1923).

Ross v. Stroh, 165 Fed. 628, 21 Am. B. R. 644 (C.C.A. 3d Cir.).

Gilbert's Collier on Bankruptcy, 4th ed., Sec. 52, p. 50.

45 Am. Jur. 127, Sec. 152:

"A receivership operates to give to the receiver the right to custody and possession of the property subject to the receivership, for the benefit of the party ultimately proving to be entitled thereto."

53 C. J. 106:

"The doctrine of relation back to the order of apointment, so as to place the property in custodia legis from that time, applies even though the receiver has not taken actual possession, or has refused to act . . ."

W. W. Wilkinson v. J. L. Walker, (U.S. D.C., No. Dist. of Texas, (Sept. 1923), Am. B.R. Vol. 2 N.S. p. 743, at p. 750:

"The order appointing a receiver of the bankrupt's entire estate, and directing the delivery of such estate to him as far as possible by the bankrupt, and enjoining all other persons from transferring or otherwise interfering with the property, effects a sequestration of the bankrupt's estate. Ross v. Stroh (C.C.A. 3d Cir.) 21 Am. B.R. 644,

165 Fed. 628, 91 .CC.A. 616. The property of the bankrupt is *in custodia legis.*"

Gilbert's Collier on Bankruptcy (4th ed.) Sec. 53, p. 50:

"Effect of Appointment: An order appointing a general receiver of the bankrupt's entire estate, directing the delivery of such estate to him as far as possible by the bankrupt, and enjoining all other persons from transferring or otherwise interfering with the property, effects a sequestration of the bankrupt's estate to such an extent as to prevent the acquisition of any new lien theeron."

6.

The power to act for a corporation in liquidating its assets through bankruptcy proceedings or by assignment for the benefit of creditors is vested in the board of directors. That was and is the law in the State of Washington. That is the law generally throughout the various states. In Oregon, however, the stockholders must duly authorize such an act. In this instance neither the stockholders or directors authorized the admission by Phillips.

Rudeback et al. v. Sanderson, 36 Am. B.R. 146 (C.C.A. 9th Cir., Nov. 15, 1915).

19 C.J.S., pages 119, 1120, 1121.

Arkansas Oil & Mining Co. v. Murray Tool & Supply Co., 127 Fed. (2d) 564 (C.C.A. 8th Cir., April, 1942).

Vol. 1 Remington, 4th Ed., Sec. 176.

QUOTING FROM AUTHORITIES

Rudeback et al. v. Sanderson, 36 Am. B.R. 146 (C.C. A. 9th Cir., 1915).

Quoting from page 148 of 36 Am. B.R., which quotes Loveland on Bankruptcy (4th Ed.):

> "'It may be said generally that the president or other officer of a corporation has not the power on his own authority to execute a voluntary petition. . .'"

Vol. 1, Remington, 4th ed., Sec. 176, page 274:

> "Also, of course, an officer cannot by writing a letter in the name of a corporation bind the corporation to this act, unless expressly authorized to do so."

Arkansas Oil & Mining Co. v. Murray Tool & Supply Co., 127 Fed. (2d) 564 (C.C.A. 8th Cir., April, 1942):

> "But there is another fatal objection to this written admission. It does not appear to have been authorized either by the board of directors or by the stockholders. Such an admission can be made only by some corporate act, and an admission by an officer, whose power to bind the corporation by such admission is not shown, is insufficient."

SUMMARY

Neither the District Court or the Circuit Court of Appeals took cognizance of the law on this point. Respondents were aware of it or they would not have

abandoned the first petition and the first cause of action in the second. The Circuit Court of Appeals said in its opinion that the admission was signed by Phillips as secretary and manager and makes no mention of any authorization by the drectors or stockholders. Both lower courts ignored completely that Phillips had been discharged at the time he signed the statement. The law as quoted was the law in this ninth circuit for many years, the Rudebeck v. Sanderson case having been decided in 1915. That statement was obviously no proper basis for bringing the first bankruptcy proceeding. It has already been shown that it was no better basis for bringing the second.

7.

The filing of an involuntary petition in bankruptcy with malice and without probable cause gives rise to a cause of action in the nature of malicious prosecution. This is the law in the State of Washington as well as the State of Oregon and generally throughout the United States.

Sachs v. Weinstein (N.Y. App. Div.) 2 Am. B. R. (N.S.) 658, 208 App. Div. 360, 203 N.Y. Sup. 449.

34 Am. Jur., Sec. 17, p. 711.

38 C.J., page 391, Sec. 17.

Mueller v. Nugent, 184 U.S. 1, 7 Am. B.R. 224, 22 Sup. Ct. 269, 46 Law Ed. 405.

Stewart v. Sonneborn, 98 U.S. 187, 25 Law Ed. 116, 86 A.L.R. 219, Annotation.

Cooley on Torts, Vol. 1 (3d Ed.) p. 345.

Wilkinson v. Goodfellow-Brooks Shoe Co., 141 Fed. 218 (C.C. Mo.).

Gilbert's Collier on Bankruptcy, 4th Ed., Sec. 1114, .p 818.

Ito Terusak, 238 Fed. 934.

QUOTING FROM AUTHORITIES

Cooley on Torts, Vol. 1 (3d ed.), p. 345:

> "In some cases an action may be maintained for malicious prosecution of a civil suit, but the authorities are not entirely agreed what cases to embrace within the rule. A case of malicious institution of proceedings in bankruptcy in *undoubtedly one.* If these are instituted maliciously and without probable cause and terminate without adjudication of bankruptcy, an action will lie for damages sustained."

Wiliknson v. Goodfellow-Brooks Shoe Co., 141 Fed. 218 (C.C. Mo.).

Page 219:

> "In my opinion, a bankruptcy proceeding cannot be said to be an ordinary civil suit. It is sui generis, and it is far reachng and drastic in its effects. Whether accompanied by actual seizure of the bankrupt's property or not, it places an embargo on his right to dispose of his property and of his business generally. . . . As the Supreme Court expresses it in Mueller v. Nugent, 184 U.S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405:
>
> " 'The filing of the petition is a caveat to all the world, and in effect an attachment and injunction.' "

Gilbert's Collier on Bankruptcy, 4th Ed., Sec. 114, p. 818:

> "but where a bankruptcy proceeding is instituted without probable cause and with malicious intent, an action for malicious prosecution will lie. If malice exists and there is no rpobable cause such action will lie, even if neither the alleged bankrupt is served nor the property is seized by process."

National Surety Co. v. Page, 58 F. (2d) 145 (C.C.A. 4th Cir.).

Page 148:

> "Civil proceedings, other than actions, which from their nature are likely to injure reputation or credit, may furnish ground of an action for malicious prosecution. 38 C.J. 391. Thus, the institution of bankruptcy proceedings may furnish ground for the action. Stewart v. Sonneborn, 98 U.S. 187, 25 L. Ed. 116.

CONCLUSION

We have not undertaken in this brief to show all the errors of the lower courts in this case, not the least of which was the refusal of the trial court to allow petitioner to try the case on its theory of conspiracy to destroy petitioner's business with resultant acts that could have no other effect. We did not mention here the abortive injunction obtained ex parte in the State court. Many other errors appear in the records, the import of which indicate a lack of comprehension by the lower courts of the real purpose

of the Federal Rules of Civil Procedure and the genuine requirements of a jury trial as intended by our Constitution. We shall but conclude with the hope and prayer that in the interest of the best public policy in the administration of justice as well as the coinciding interest of petitioner, this court will give heed to our cry of wrong, and, upon finding the arbitrary injustice done us, will set down the true principles of law on the issues presented.

Respectfully submitted,

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